lit.

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

EVERGREEN ISLANDS, Appellant, v. CITY OF ANACORTES, LEEWARD DEVELOPMENT, INC.; and DOMINION EQUITY CORPORATION, Respondents.	SHB No. 91-39 ORDER OF DISMISSAL

This matter involves cross motions for summary judgment and dismissal. The appeal contests revisions approved by the City of Anacortes to the shoreline permit of Dominion Equity Corporation and Leeward Development, Inc. for development of a resort community known as Ship Harbor near the State ferry terminal in Anacortes. Having considered the following:

1. Respondent Leeward Development, Inc. and Dominion Equity Corporation's Motion to Dismiss or in the alternative to Expedite the Hearing together with the affidavit of Gary D. Huff with exhibits and Memorandum in Support.

2. Memorandum in Opposition to Respondent's Motion to Dismiss and Certified Statement of Andrew Salter.

3. Reply of Respondents Leeward Development, Inc. and Dominion Equity Corporation Re: Motion to Dismiss with the Declaration of Douglas R. Stephan with exhibits and the affidavit of Leslie A.

Johnson, General Counsel of the Port of Anacortes with exhibits and the Supplemental Affidavit of Gary D. Huff with exhibits.

4. Appellant's Motion for Summary Judgment and the Certified Statement of Karen Lough with exhibits.

5. Response of Leeward Development, Inc. and Dominion Equity Corporation to Evergreen Island's Motion for Summary Judgment with the affdiavit of William A. Isley with exhibits.

6. Appellant's Reply Memorandum in Support of Motion for Summary Judgment with the Certified Statement of Dr. Richard Threet with exhibits.

7. Affidavit of Ian Munce.

8. Appellant's Motion to Strike the Affidavit of Ian S. Munce with exhibits.

9. Motion to Strike the Affidavit of Dr. Richard Threet with the affidavit of Gary D. Huff with exhibits.

10. Second Supplemental Affidavit of Gary D. Huff with exhibits.

11. Evergreen Island's Reply Re: Motion to Strike the Affidavit of Ian S. Munce.

12. Appellant Evergreen Island's Response to respondents' Motion to Strike with exhibits.

Together with the records and files herein and, being fully advised, we rule as follows:

I. MOTIONS TO STRIKE

Cross motions to strike the affidavits of Ian S. Munce and Dr. Richard Threet are each denied.

II. PRIOR PROCEEDINGS

The history of these proceedings began on March 23, 1984, with an application of Leeward Development, Inc. to the City of Anacortes for a shoreline permit to construct a marine recreation and residential development near the ferry terminal at Anacortes. The City granted Leeward's application for the development, known as Ship Harbor, on June 22, 1984.

Appellant Evergreen Islands, filed a timely appeal from the City's approval to this Board in 1984. The State Department of Ecology intervened. In direct succession, a settlement conference was convened among the parties, Judge Harrison presiding. Each party utilized its best efforts to resolve differences. Chiefly, those differences concerned protection of wetlands lying between the ferry terminal and the proposed development. There were also differences concerning the marina and sub-tidal crab habitat. Experts were engaged to investigate and report on both the wetlands and the sub-tidal crab habitat. After more than a year of wide-ranging negotiation, a comprehensive Settlement Agreement was reached by the parties. This was presented and entered by the Board on February 26, 1986. Evergreen Islands, et. al. v. City of Anacortes, et. al.,

SHB No. 84-37 (1986). A shoreline permit reflecting the agreement of the parties was issued by the City on July 13, 1987.

The shoreline permit mitigated the proposal's effect on crab habitat by 1) relocating portions of the marina, 2) reducing the number of slips from 755 to 500 and 3) substituting a floating, rather than rock, breakwater. The permit, also reflecting the Settlement Agreement, provided that the wetlands were to be surveyed and staked by the Department of Ecology. This wetland survey was completed in 1988. In the meanwhile, Leeward began negotiation to transfer its interests in the project to respondent, Dominion Equity Corporation.

The wetland staking conducted by the Department of Ecology established more extensive wetland boundaries than had been originally contemplated. As the Settlement Agreement prohibits construction in or over any wetlands, Dominion Equity found it necessary to modify the site plan so as to avoid those wetland areas.

III. PRESENT PROCEEDINGS

On May 15, 1991, Dominion applied to the City for a revised site plan approval. It is undisputed that a key feature of the proposal - the hotel - had been determined by Ecology to be within the wetland area. Consequently, the revision request sought to relocate the hotel away from the wetland area. It also sought to relocate the residential, parking and retail components of the proposal to accommodate the relocated hotel. The revision application of Dominion

was approved by the City on May 24, 1991. In an effort to achieve agreement among parties to the original appeal, an amendment to the Settlement Agreement was prepared on June 20, 1991. This was subscribed by Dominion, the City, the Port of Anacortes and Department of Ecology. Evergreen Islands did not subscribe. Instead, Evergreen appealed the May 24, 1991, revision to this Board. Subsequently, Dominion sought and the City approved 1) revocation of the May 24, 1991 revision and 2) substitution of a new revision dated July 22, 1991. The new revision, by agreement of the parties, is the item now on appeal. It also relocated the hotel away from the wetland area and relocates residential and parking components. It specifically defers action with regard to relocation of the retail component. Space for the retail component is available within the site.

IV. DECISION

The issues raised by these cross motions are as follows:

1. Whether the revision is within the "scope and intent" of the original permit as described at WAC 173-14-064?

2. Whether there was adequate notice of the revision?

3. Whether the application for the revision contains the minimum information?

4. Whether the revision contains improper and unfulfilled contingencies?

5. Whether the revision complies with the State Environmental Policy Act (SEPA), Chapter 43.21C RCW?

6. Whether the 1986 Settlement Agreement precludes this appeal?

7. Whether this matter must come to trial before this Board within 45 days of the filing of the appeal?

We now take these issues up in turn:

1. Scope and Intent. This case involves a 1987 shoreline permit which Dominion now seeks to revise. Shoreline permit revisions are governed by WAC 173-14-064 promulgated by the Department of Ecology. At subsection (1) of that rule it states:

> *If local government determines that the proposed changes are within the scope and intent of the original permit, local government may approve a revision.*

The term "within the scope and intent of the original permit" is defined at subsection (2) of the rule. In subsection (7) it states that as to revisions:

> *Appeals shall be based only upon contentions of noncompliance with the provisons of WAC 173-14-064(2) [defining "within the scope and intent of the original permit"].*

The sum total of this is that in a revision appeal the merits of the revision are not before us. Goodman v. City of Spokane, SHB No. 214 (1976). If the revisions are beyond the scope and intent of the original permit, a new permit must be sought. Goodman and WAC 173-14-064(3). But if the revisions are within the scope and intent

of the original permit, the revisions may be directly approved by local government. WAC 173-14-064(1). In the latter instance, the propriety of the revisions flows from the original permit.

"Within the scope and intent of the original permit" means all of the following under WAC 173-14-064(2):

> *(a) No additional over water construction is involved except that pier, dock, or float construction may be increased by five hundred square feet or ten percent from the provisions of the original permit, whichever is less;*
> *(b) Ground area coverage and height of each structure may be increased a maximum of ten percent from the provisions of the original permit;*
> *(c) Additional separate structures may not exceed a total of two hundred fifty square feet;*
> *(d) The revised permit does not authorize development to exceed height, lot coverage, setback, or any other requirements of the applicable master program except as authorized under the original permit;*
> *(e) Additional landscaping is consistent with conditions (if any) attached to the original permit and with the applicable master program;*
> *(f) The use authorized pursuant to the original permit is not changed; and*
> *(g) No substantial adverse environmental impact will be caused by the project revision.*

A. No issue has been raised in this case relating to over water construction under WAC 173-14-064(2)(a).

B. With regard to ground area coverage under WAC 173-14-064(2)(b), Dominion has filed the affidavit of its architect comparing the original and revised ground area coverage of hotel, residential and parking structures. Each comparison reveals a

reduction of ground area coverage.

1. Hotel. Evergreen has filed an affidavit asserting that the hotel complex would increase under the revision from 62,000 to 75,000 square feet. Yet it is apparent from the attached site plans that the 62,000 square foot figure is the building "footprint" (Exhibit 4 to Threet affidavit and Exhibit B to Isley affidavit). While the term "ground area coverage" is not defined in WAC 173-14-064, we agree with Dominion's position that it includes not only the building footprint, but associated paving, decks, roof overhangs and balconies. Thus, the material issue, ground area coverage, is not placed in dispute by Evergreen's affidavit concerning the hotel footprint.

2. Parking. Evergreen's affidavit shows calculations which conclude that ground area coverage of parking will be increased. Dominion's affidavit shows that it will be reduced. But there is more. Within the City's approved revision, Condition 6 provides:

> The ground area coverage of the parking garage shall be no greater than 95,400 square feet, which represents an increase of 34,600 square feet from the prior approved plan. However, as a result of this increase, the surface parking shall be reduced by approximately 100,000 square feet. Thus the net ground area coverage for parking shall be significantly reduced from the prior approved plan.

Both parking garages and lots are structures within the meaning of WAC 173-14-064(2). It is a requirement of the revision approval itself that the ground area coverage of parking shall be reduced. The conflict of the affidavits speaks only to whether that condition of approval will be met. That conflict is irrelevant to the issue of whether the revision, as conditioned, is within the scope and intent of the original shoreline permit.

3. Chandlery. Similarly, Evergreen's affidavit shows an increase in the chandlery building from 3,000 to 4,000 square feet. The City's revised site plan (attachment C to the certified statement of Evergreen's counsel), however, specifies 3,000 square feet. The affidavit speaks only to whether that requirement will be met. As such it is irrelevant to the issue of whether the revision is within the scope and intent of the original shoreline permit.

4. Residences. The same analysis applies here. Evergreen cites the Final Environmental Impact Statement (FEIS) at Addendum No. 3 (attached as Exhibit A to the June 20, 1991, request for review). That document shows an increase in

square footage of residences from 227,500 square feet to 298,800 square feet. However, the City's approved revision at Condition 4 provides:

> *The ground area coverage of the residences shall not be greater than 217,000 square feet, which is less than the prior approved plan, and the number of individual structures shall not exceed thirty-four (34), which is equal to the prior approved plan.*

Again, the figures cited by Evergreen are irrelevant to the issue of whether the revision is within the scope and intent of the original shoreline permit. It is the revision approval, not the FEIS, which controls development.

5. Retail. Retail structures are not addressed by the revision on appeal.

6. Relocation and combination of structures. Evergreen cites Goodman v. City of Spokane, SHB No. 214 (1976) for the proposition that relocation of a structure equates to a new structure necessitating a new permit. We disagree. Goodman is distinguishable in that it involved placement of a parking lot where the original permit showed no parking lot anywhere on the site. (Finding of Fact VII). Since Goodman, moreover, we have decided cases which are on point with this one. In Geis v. City of Seattle and Rock, SHB No. 77-10 (1977), we affirmed

the relocation of a home by permit revision. In Citizens for Sensible Residential Zoning v. City of Bremerton and Weeks, SHB no. 79-35 (1980) we not only affirmed the relocation of a condominium building by permit revision, but also the combination of two other condominium buildings. Neither the relocation nor combination of structures which are allowed by an original permit, constitutes a "new structure." When done in compliance with ground area coverage and the other requirements of WAC 173-14-064, such development may proceed by permit revision.

We are aware that since the cases cited above Ecology has amended WAC 173-14-064(2)(b) to limit the ground area coverage of "each structure" as opposed to total lot coverage. This change does not suggest to us that combining two or more previously approved structures in a manner that has a positive environmental impact would violate the rule. We decline to adopt a strained construction of the rule as it would hinder the very type of project mitigation which we believe the revision rule is adopted to facilitate. Such a strained construction would violate the spirit and intent of the rule.

C. With regard to additional separate structures under WAC 173-14-064(2)(c), Evergreen states by affidavit that a restroom building has been added to the project. It specifies that the building is not on "Exhibit B" of Isley described as the original site plan and dated January 14, 1986. Dominion's affidavit specifies that the building is shown on "Exhibit F" of Isley which is described as the "First Amendment" to the original site plan and which is dated August 28, 1986. Dominion states by affidavit that Evergreen had previously given its approval to this First Amendment. Evergreen does not dispute this by affidavit.

D. No issue has been raised in this case relating to height, lot coverage, setback or any other master program requirements except as authorized by the original permit under WAC 173-14-064(2)(d).

E. No issue has been raised as to landscaping under WAC 173-14-064(2)(e).

F. No issue has been raised as to change of use under WAC 173-14-064(2)(f).

G. We see no substantial adverse environmental impact under WAC 173-14-064(2)(g). To the contrary, the relocation of the hotel away from the wetland area, the consolidation of parking structures and movement of parking back from the water and other features of the revision indicate a substantial improvement in environmental effect. So, too, is there improvement in public access (affidavit of General

Counsel for the Port of Anacortes). Evergreen does not dispute by affidavit this improvement in public access.

There are no genuine issues of material fact on this issue. The July 22, 1991, revision is within the scope and intent of the original shoreline permit issued in 1987 for the Ship Harbor development.

2. Notice. It is undisputed that the City neither published, posted, mailed or otherwise gave notice of Dominion's application for a permit revision. That type of notice is prescribed by RCW 90.58.140(4) and WAC 173-14-070 for original shoreline applications. In this case notice of that type would have been required in 1984 at the time the Ship Harbor development was proposed. Yet none of the foregoing applies to the revision now at issue. There is no requirement of public notice prior to local government action approving or disapproving a revision under WAC 173-14-064(1). Condominium Builders, Inc. v. City of Seattle and Lockhaven Marina, Inc., SHB No. 85-19 (1986); Brachvogel v. Mason County, SHB No. 189 (1975), aff'd, Thurston County Civil Docket No. 53266 (1976). The rationale for this rule is sound in that public notice and comment is widely solicited before issuance of a shoreline permit. Revisions to a permit which are within its scope and intent are then summarily approvable as part of the previously completed permit process. Only when revisions to a shoreline permit exceed its

scope and intent is there occasion to re-commence the cycle of application, public notice comment and permit approval or denial. Save Flounder Bay v. City of Anacortes, et. al., SHB No. 81-15 (1982) and related cases cited by Evergreen are inapposite as applicable only to initial issuance of a shoreline permit and not to its revision. There was no requirement for prior public notice of Dominion's revision application or approval thereof by the City.

Under WAC 173-14-064(4) one may ask local government to be apprised of the outcome of any revision application. Condominium Builders, supra, at 3. Such a request is made in response to the original notice of a shoreline permit application under RCW 90.58.140(4) and WAC 173-14-070. Id. Dominion has filed the affidavit of the City Shorelines Administrator that no one, including Evergreen, has ever requested (in writing) notice from the City of any action taken on these applications. Moreover, the affidavit of Dominion's counsel submits Interrogatory No. 2 into this record which is to the same effect as the shorelines administrator's affidavit. Evergreen does not dispute by affidavit the absence of any request to be apprised of the action on these applications. We are aware that WAC 173-14-060(4) has been amended since Condominium Builders, supra, to require cities to notify "parties of record" and deleting specific reference to persons making request under WAC 173-14-070. However, the rule provides no other way, and we can conceive of none, to become

a "party of record" other than by making the type of request contemplated by WAC 173-14-070. We reject Evergreen's contention that persons commenting on the 1981 draft EIS had implicitly requested to be notified of the City's permit or revision decisions. We hold further that to become a "party of record" entitled to notice under WAC 173-14-064(4) one must make an explicit request. Evergreen did not make an explicit request, and was not a "party of record." It was not entitled to receive notice of the revision after its approval by the City under WAC 173-14-064(4).

Nothwithstanding all of the above, Evergreen in fact was given actual notice of the revision by the City. (Certified statements of Evergreen's counsel.) That notice was adequate to inform Evergreen of the City's action. Evergreen timely commenced this appeal and has shown no prejudice with regard to this notice given by the City.

There is no genuine issue of material fact on this issue. The notice of this revision was adequate.

3. Minimum Information on the Application. It is undisputed that Dominion's revision application includes site plans without building dimensions drawn upon the buildings. In this regard, Evergreen cites WAC 173-14-110 adopted by Ecology to state the minimum information required on a shoreline application. Like the requirements of the notice rule, WAC 173-14-070, the application rule, WAC 173-14-110, applies to initial shoreline applications and not

revisions. Revisions are governed by WAC 173-14-064 which states:

> *When an applicant seeks to revise a permit, local government shall request from the applicant detailed plans and text describing the proposed changes in the permit.*

While we disagree that WAC 173-14-110 applies here, we would agree with Evergreen's position that "dimensions and locations of proposed structures" as required by -110 are an important consideration. We read -064, above, as requiring the same. Yet Dominion's site plan as approved by the City (attachment C to certified statement of Evergreen's counsel) contains a scale which allows dimensions of structures to be determined. Also, the site plan shows the location of structures. The City's approval provides that the "exact location" of buildings will be determined after a topographic survey. Condition 2. Yet it also provides that final building locations will substantially comply with the site plan. Id. In this respect the facts are distinguishable from those of SAVE v. Bothell, SHB Nos. 82-29, 82-36, 82-43 and 82-53 (1983), where there was only a verbal description of a building envelope and no scale drawing showing the location or uses of buildings. Dominion has provided a scale drawing showing dimensions and locations of structures. It has met the requirement of WAC 173-14-064 for "detailed plans."

There is no genuine issue of material fact on this issue. The revision application contained the necessary information.

4. Contingencies. The revision approved by the City contains three provisions which Evergreen cites as unfulfilled contingencies: A) a topographic survey (Condition 2), B) a traffic mitigation plan (Condition 7), and C) a geotechnical engineering study (Condition 11).

A. Topographic Survey. The site diagrams in shoreline permit or revision matters must provide sufficient detail for the public, local government and the Board to determine consistency of the proposal with the shoreline law. See SAVE v. Bothell, SHB Nos. 82-29, 82-36, 82-43 and 82-53 (1983). Yet further work by both engineers and architects may often be necessary before detailed building plans can be devised. The topographic survey of this permit is in the latter category. Nothing about it suggests that the site diagram forming the basis of this revision will be materially altered. As we concluded earlier, Condition 2 requires that building locations "substantially comply" with the site diagram. This will prevent material departure from the plan as approved. Such a contingency does not impair the City's revision approval.

B. Traffic mitigation plan. The traffic mitigation plan in the revision is drawn directly from the original shoreline permit issued pursuant to the Settlement Agreement. Evergreen cannot in this revision appeal, step behind the Settlement Agreement to challenge that requirement.

c. Geotechnical engineering study. Evergreen points out that this revision locates the hotel on the slope of an old landslide. Under the Settlement Agreement, Evergreen previously agreed to construction at that location. Compare Exhibit 4 showing the original site plan and Exhibit 6 showing the revised site plan, both attached to Evergreen's affidavit. Moreover, soil sampling in 1984 and engineering reconaissance in 1991 have led to the following conclusion from Dominion's engineering consultant (Exhibit 1 to affidavit of General Counsel for the Port of Anacortes):

> *It is our opinion that the hotel could be constructed at its presently planned location, provided, that the structure is designed and constructed with appropriate consideration of slope stability. Various design and construction techniques could be incorporated into the project to significantly improve the existing slope stability and to maintain a long term factor of safety with respect to slope stability that is consistent with standard engineering practice for a structure of this size and significance.*

Evergreen does not dispute this conclusion. Rather, it asserts that the remaining geotechnical study constitutes a flaw in the revision approval. We disagree. It is true that an unfulfilled contingency can lead to reversal of shoreline approval. Department of Ecology v. City of Tacoma and Barden, SHB Nos. 83-42, 84-27, and 84-33 (1985).

We reversed the shoreline approval in Barden because the very feasibility of the proposal was contingent on future study. Here, by contrast, geotechnical study has already shown the feasibility of locating the hotel as proposed. Only the choice of building technique remains contingent on future study. The requirement of a geotechnical engineering study on the facts of this case is appropriate.

There is no genuine issue of material fact on this issue. The unfulfilled contingencies of this revision are proper and appropriate.

5. State Environmental Policy Act. A "Notice of Action" was published by the City under RCW 43.21C.080 of the State Environmental Policy Act (SEPA). This was done in connection with the original shoreline permit for Ship Harbor issued in 1987. (Exhibit E to affidavit of Dominion's counsel). The opportunity to challenge SEPA compliance had by then been waived by Evergreen which, instead, entered the Settlement Agreement. Under RCW 43.21C.080, a SEPA challenge cannot be raised on this revision appeal because:

> . . . *any subsequent governmental action on the proposal for which notice has been given as provided in subsection (1) of this section shall not be set aside, enjoined, reviewed or otherwise challenged on grounds of noncompliance with the provisions of RCW 43.21C.030(2)(a) through (h) unless there has been a substantial change in the proposal between the time of the first governmental action and the subsequent governmental action*. . . RCW 43.21C.080(2)(a) (Emphasis added.)

In this case the "first governmental action" was issuance of the Ship Harbor shoreline permit in 1987. The "subsequent governmental action" is the revision now on appeal. For the same reasons that the revision is within the scope and intent of the original shoreline permit, we now conclude that there has been no "substantial change" in the proposal under RCW 43.21.080(2)(a) of SEPA, above.

There is no genuine issue of material fact on this issue. Evergreen is barred by RCW 43.21C.080 from challenging this revision for SEPA compliance.

6. Settlement Agreement as Precluding Appeal. Dominion urges that the 1986 Settlement Agreement precludes this appeal. We agree in part. Paragraph 25 of the Settlement Agreemnet provides:

> *25. EI and the individual members of EI signing hereafter agree not to oppose, appeal or otherwise interfere with whether directly or indirectly, any other permit applications required for said project so long as said applications are consistent with this agreement, its exhibits and the Shoreline Substantial Development permit to be based hereon.* (Emphasis added.)

The consistency of this revision with the original permit and underlying Settlement Agreement has been established for the same reasons that the revision lies within the "scope and intent" of the original permit under WAC 173-14-064. We construe both the Settlement Agreement and WAC 173-14-064 to allow a limited appeal from this revision where the only substantive issue is whether the revision is

within the scope and intent of the original permit. See WAC 173-14-064(7). We have concluded that it is. We have also reviewd certain procedural claims having to do with notice, contents of the application, contingencies, and SEPA. By its Request for Review, Evergreen invites review of the revision for substantive compliance with the policy of the shoreline management act (SMA) and specific standards within the shoreline master program. Such review, however, is barred by our conclusion that the revision represents no "substantial change" from and is within the "scope and intent" of the original permit. Section 25 of the Settlement Agreement as well as WAC 173-14-064(1) and (7) set forth earlier in this opinion impart to this revision, by law, the propriety determined when the orignal permit was issued.

There is no genuine issue of material fact on this issue. Both the Settlement Agreement and WAC 173-14-064(1) and (7) bar review for compliance with the SMA and master program on appeal from a permit revision.

7. Trial Within 45 Days. Dominion contends that RCW 43.17.065, as amended by SHB 1341 (Section 28, Chapter 314, Laws of 1991) requires that this matter come to trial in 45 days, displacing other cases already set. We find no merit in that contention. The 1991 amendment applies when:

> . . . *power is vested in a department to issue permits, licenses, certifications, contracts, grants or otherwise authorize action*. . . . RCW 43.17.065, as amended

First, the term, "department," above should be read to have the same meaning as it does elsewhere in that chapter. At RCW 43.17.010 various executive departments are enumerated. This Board is not listed. Second, we neither "issue permits, licenses, certifications, contracts, grants or otherwise authorize action." Those functions are granted by the SMA to cities and counties. We review such actions when an appeal is filed. Third, the language of RCW 43.17.065 cited by Dominion states:

> *. . . shall . . . respond to any completed application within 45 days of its receipt.*

While Dominion construes this to mean commencing a trial, the term "respond" more properly suggests that a final decision be reached in that time. Such a requirement conflicts with the Administrative Procedure Act (APA) which governs quasi-judicial tribunals such as this Board. At RCW 34.05.461(8) the APA allows ninety (90) days from completion of the hearing (trial) to issuance of the final order. The cited provisions of RCW 43.17.065 cannot implicitly supersede the APA. RCW 34.05.020. Nor do we believe that RCW 43.17.065 was intended to supersede the APA.

Cases before this Board, will be advanced as rapidly as the interests of justice allow. The provisions of RCW 43.17.065 do not require either trial or decision to be reached in 45 days.

V. SUMMARY

There is no genuine issue as to any material fact. Dominion is entitled to judgment as a matter of law that a) the revision is within the scope and intent of the original shoreline permit b) notice was adequate, c) the application contained necessary information d) contingencies within the approval were appropriate e) SEPA challenge is barred and f) the 1986 Settlement Agreement and WAC 173-14-064 bar review, on a revision appeal, for compliance with the SMA and master program.

Dominion has shown entitlement to judgment on each issue of the Request for Review. Evergreen's motion for summary judgment should be denied. Dominion's Motion to Dismiss should be granted.

The history of this case has involved zealous disputation between the parties while at the same time it has produced exemplary agreement. In no sense can either side fairly deny the positive contribution of the other side in the evolution of this project. This decision is issued with the admonition that while litigation can break an impasse, so, too, can mutual cooperation.

ORDER

1. The appellant's Motion for Summary Judgment is denied.

2. The respondent's Motion for Dismissal is granted.

DONE at Lacey, WA, this 14th day of February, 1992.

SHORELINES HEARINGS BOARD

HAROLD S. ZIMMERMAN, Chairman

JUDITH A. BENDOR, Member

ANNETTE S. McGEE, Member

NANCY BURNETT, Member

DAVE WOLFENBARGER, Member

MARK O. ERICKSON, Member

WILLIAM A. HARRISON
Administrative Appeals Judge

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